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In the Supreme Court

OF THE

UNITED STATES.

THE CALHOUN GOLD MINING COMPANY, *Plaintiff in Error*, vs. THE AJAX GOLD MINING COMPANY, *Defendant in Error*.	*No. 195.*

BRIEF OF DEFENDANT IN ERROR.

This cause was originally tried in the District Court of the state of Colorado. The trial was to the court without a jury, and on an agreed statement of facts. Based upon this statement of facts four propositions of law were argued and submitted.

The District Court of the state rendered judgment in favor of the plaintiff, The Ajax Company, upon all the questions of law so submitted.

From that judgment, The Calhoun Company, defendant in the cause, took its appeal to the Supreme Court of the state. In the latter court, upon full argument and mature consideration, a judgment was rendered affirming the judgment of the trial court throughout.

To review the judgment so rendered by the Supreme Court of Colorado, the present writ of error was sued out from this Honorable Court by The Calhoun Company and the cause is brought here under the federal statute controlling such proceedings. No jurisdictional question is interposed, and the whole case is submitted for decision upon the merits.

There being no controverted questions of fact, and the facts being comparatively few and simple, the present record is entirely freed from many of the difficulties usually attending reviews in important cases by this Honorable Court.

I.

THE FACTS.

As above suggested, the facts upon which the decision of this court is solicited are, for the purposes of such decision, uncontroverted. They show

a controversy between The Ajax Company, the original plaintiff, the owner of certain lode claims, and The Calhoun Company, the original defendant, claiming ownership of a tunnel, and also an alleged cross lode location, both being junior to plaintiff's claims. Plaintiff in error asserts ownership of certain lodes cut in said tunnel upon the ground of defendant in error; it also asserts ownership of the ore in its alleged cross vein within the territory of the defendant in error, under a construction of the statutes formerly given by the Supreme Court of Colorado. An examination of the statement of facts, exhibits and admissions in the pleadings discloses the following, to wit:

First. That defendant in error is the owner in fee of three patented claims, namely, the Apex, Monarch and Mammoth Pearl, on Battle mountain in the Cripple Creek mining district, Teller county, Colorado; that applications for patent were filed—on the Apex, March 31, 1893, and on the Monarch and Mammoth Pearl, May 9, 1893; that receiver's receipts issued—for the Apex, January 16, 1895, and for the Monarch and Mammoth Pearl, March 6, 1895; that patents issued—for the Apex, April 22, 1895, and for the Monarch and Mammoth Pearl, September 6, 1895.

Second. That plaintiff in error was owner of the Ithaca tunnel and tunnel site, and also of the Victor Consolidated claim in the same locality; that the Ithaca tunnel site was located (and the

tunnel begun) August 19, 1895; that the Victor Consolidated was located November 2, 1893, and patent issued January 25, 1897; and that the Victor Consolidated location as marked on the surface, intersected the claims of defendant in error for a distance of upward of 600 feet. By reference to the plat shown in the printed abstract, the position of these properties will be seen at a glance. The patent of the Victor Consolidated, owned by plaintiff in error, covered and conveyed only those portions of the territory shown upon the plat colored in red. All of the intervening territory where the Victor Consolidated conflicts with the Apex, Monarch and Mammoth Pearl claims, belongs to defendant in error.

Third. That the patents of defendant in error expressly cover and include all of this apparent surface conflict; that these patents also grant to defendant in error "all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of" such conflicting ground, that the receiver's receipts of defendant in error likewise make the same grant in the same language. Further, that the application of plaintiff in error to purchase the said Victor Consolidated claim, its receiver's receipt and its patent expressly mention the said claims of defendant in error, and exclude from the Victor Consolidated all the territory within the surface boundaries of the Victor Consolidated location embraced in the said mining claims of defendant in error, "together with all

veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of said excluded ground."

Fourth. Thus it appears that the tunnel rights of plaintiff in error, whatever they may be, were acquired by a junior location made four years subsequent to the location of the claims of defendant in error, over two years after application for patent therefor, over seven months and five months respectively after issue of the receiver's receipts, four months after the Apex patent itself had been issued and but eighteen days before the Monarch and Mammoth Pearl patent issued.

Thus it also appears that the Victor Consolidated claim of plaintiff in error was located two years after the claims of defendant in error were located, eight months and seven months respectively after application for patent thereon, and while the patent proceedings of defendant in error were so pending in the United States Land Office.

Finally, thus it appears that all of the conflicting ground between said claims of defendant in error and the said Victor Consolidated claim of plaintiff in error "together with all veins, lodes and ledges throughout their entire depth, the tops or apexes of which" lie therein, were expressly conveyed to defendant in error in fee simple by the solemn grant of United States patents; likewise, that all such territory, and all such veins were expressly reserved and excluded from the grant to

plaintiff in error in the Victor Consolidated patent.

Fifth. Moreover, the following facts are not disputed, viz:

That the patents of defendant in error are, and ever since their issue have been in full force and effect;

That no direct effort has ever been made to attack them for fraud or otherwise, nor has there been, or is there now pending any attempt to set them aside;

That down to the time of the trespass by plaintiff in error by means of its said tunnel, defendant in error remained, under its patents, in the quiet, peaceable and undisputed possession of the whole of its territory, with all veins therein, and all rights and appurtenances thereunto belonging; and,

That plaintiff in error without the consent of defendant in error entered upon the latter's ground with said tunnel at a depth of about 100 feet below the surface, and without the consent of defendant in error, ran the same 900 feet into its territory, cutting nine or ten veins in so doing.

Certain subordinate and associate facts also appear; but the foregoing constitute the leading, salient and controlling facts in the case.

II.

THE LEGAL PROPOSITIONS SUBMITTED.

Upon the foregoing facts certain legal propositions properly arise, and are submitted for decision. These questions of law are stated in the brief of plaintiff in error. We restate them in the order in which we propose to present them in the following argument:

1st. Whether or not plaintiff in error is the owner of, and entitled to the ore contained in the vein of its Victor Consolidated claim within the surface boundaries of, and across plaintiff's lode claims.

2d. Whether or not plaintiff in error acquired, by virtue of its said tunnel site location and tunnel, the ownership and right to the possession of the veins or lodes not appearing on the surface, and not known to exist prior to the date of the location of the tunnel site, within the territory patented by and belonging to defendant in error.

3d. Whether or not the Ithaca tunnel, so belonging to the plaintiff in error, was and is entitled to a right of way through the said prior patented mining claims of defendant in error.

4th. Whether or not plaintiff in error was entitled, under the law, to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth

Pearl claims of defendant in error, prior to the location of said tunnel site.

Thus it will be seen that while the facts in the case are comparatively few and simple, the legal questions involved are of the most grave and far reaching importance.

III.

THE CROSS LODE QUESTION

By turning again to the plat in the abstract of record, Your Honors will see that the Victor Consolidated claim belonging to plaintiff in error was located across the Monarch and Mammoth Pearl claims, and also, to a large extent, lengthwise of the Apex claim of defendant in error. As above stated, such location was made a number of years after the locations of the three claims of defendant in error, and while patent proceedings were pending therefor. The only territory that the Victor Consolidated could get was the two small and irregular shaped pieces of ground colored red. The Victor Consolidated claim was located upon a vein which, according to the statement of facts, extends lengthwise of that claim from one of the red pieces of ground to the other, and through the intermediate territory belonging to defendant in error.

What we have denominated the cross lode question is peculiar to the state of Colorado.

While locations of segregated territory have been allowed elsewhere, and the segregated portions have been patented, as in the case of the Victor Consolidated, yet nowhere else in any of the mining states or territories, save in Colorado, has the locator of such a claim been given any right to the vein upon which he locates, within the conflicting territory belonging to the senior locations. As we shall presently see, in California, Arizona and Montana, the question of ownership of such vein through the territory belonging to the senior location and patented claim, has arisen and has been determined by the courts of last resort against the contention of the junior cross lode locator. That is to say, the courts of those states and that territory have held that a junior cross location owner can only follow his vein on its strike to the point where it enters the territory of the senior location, and from the point where it departs from such territory on the other side.

In Colorado, however, by a series of decisions beginning with Hall vs. The Equator Co., in the United States Circuit Court, and Branagan vs. Dulany, 8 Colo., 408, in the State Supreme Court, a different view was originally taken. By these decisions it was held that junior cross lode claimants, like the owner of the Victor Consolidated, were entitled to the vein upon which such locations were made, through the entire space of intersection with the senior lode locations or claims, except only as to the ore at the

comparatively small and insignificant space of intersection of the vein itself with the location vein of the senior claim. That is to say, although the cross lode location was made long and subsequent to the location of the claim with which it conflicted, or even subsequent to the patenting of such claim, yet the owner of the junior cross lode location became also the owner of his vein entirely through the conflicting territory, except at the space of its vein intersection.

This doctrine or construction of the statute was anomalous; it originated in the supposition that there was an irreconcilable conflict between two sections of the same federal statute, the act of 1872; and the application of the arbitrary rule of construction that in such case the subsequent section would control the prior section. It began with Hall vs. The Equator Co., wherein Judge Hallett, in the haste of *nisi prius* proceedings, without much investigation, and in the course of a few incidental remarks in passing upon a demurrer, announced the view mentioned. This view was adopted afterward in the case of Branagan vs. Dulany, by the Supreme Court of the state, reliance being placed largely, as is shown by the opinion, upon the view expressed in Hall vs. The Equator Co.; the question not being seriously contested or carefully presented by the parties or counsel. The subsequent decisions by the same Supreme Court, viz.: Lee vs. Stahl, 9 Colo., 208,

Morgenson vs. Middlesex M. & M. Co., 11 Colo., 176, Lee vs. Stahl again in 13 Colo., 174, and Coffee vs. Emigh, 15 Colo., 184, simply follow the rule stated in Branagan vs. Dulany without discussion or question, the subject not being insisted upon or specially urged upon the court's attention.

This arbitrary and inequitable rule never received the sanction generally of the bar of Colorado, and it was always regarded with a great deal of misgiving. The feeling in relation thereto, particularly after a different view was announced by the Supreme Courts of California, Montana and Arizona, was such that when the present case was brought, and the contrary view was earnestly insisted upon, even one of the district courts of Colorado, as already observed, rejected the rule as thus laid down by the Supreme Court of the state, and adopted the conclusion reached by the other tribunals just mentioned.

Afterwards, upon appeal by the present plaintiff in error to the Supreme Court of Colorado, that court itself became convinced of the error in its previous construction of the statutes involved, and after very mature deliberation and investgation, overruled the former decisions, and by an able opinion, which appears in full in the transcript, placed itself in line with the Supreme Courts heretofore mentioned; that is to say, the present attitude of the Supreme Court of Colorado, as announced in the opinion filed in the case at bar,

is that the junior cross-lode claimant is not entitled to follow his vein on its strike into any portion of the territory included within a senior conflicting location.

Counsel for plaintiff in error in this court challenges the decision under review upon two grounds, viz.:

First—That the former view of the Supreme Court of Colorado was a correct construction of the federal statutes involved; and that the present conclusion, although in harmony with the conclusion of California, Montana and Arizona is erroneous; but

Second—That even if this position be wrong, nevertheless, since the former "Colorado rule" has been in existence for upwards of fifteen years it had become a rule of property in that state, and for this reason the Supreme Court had no power or right to change its position to the injury of plaintiff in error.

We will, therefore, address ourselves to a brief discussion of these questions.

FIRST. THE JUNIOR CROSS-LODE CLAIMANT HAS NO RIGHTS WITHIN THE SENIOR CONFLICTING LOCATION.

This subject must be determined by a construction of Sections 2322 and 2336 of the United States Revised Statutes.

> Section 2322 reads, *inter alia*, "The locators of all mining locations heretofore made or which shall hereafter be made on any mineral vein, lode or ledge situated on the public domain * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins or lodes may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."
>
> Section 2336 reads, "When two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purpose of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The language of Section 2322 is clear; but its co-existence with Section 2336 has led to a doubt as to whether it should be given full force and effect. As already suggested the former decisions of the Supreme Court of Colorado, announcing the rule that the junior locator of a cross vein is entitled to all the ore through the senior location, except at

the point of intersection of the two veins, rests solely upon two assumptions; *first*, that the above statutes are necessarily and unavoidably in conflict, and, *second*, that this being true, the subsequent section controls and modifies the earlier section, both being in the same act.

It is needless to here cite authorities upon the proposition that this arbitrary rule of construction is never invoked where it can be avoided. And this is especially true where the alleged conflict exists, as in the present case, between different provisions of an act adopted by the same legislative body at the same instant of time. If any reasonable construction can be given to the two provisions, so as to give force and effect to all parts of each, it is the imperative duty of courts to adopt such construction. The books are full of cases where courts have taken great pains to find some reasonable view upon which they can harmonize statutes seemingly in conflict, and avoid the application of this extremely technical and arbitrary rule of construction.

We confidently assert that when carefully considered, there is no necessary conflict between the two sections. Nor are we compelled to resort to any strained or unnatural construction of either, in order to avoid such conflict. In fact, it is quite as easy to give the two provisions a construction that will make them entirely harmonious, as to reach a conclusion that they are necessarily and absolutely in conflict.

Section 2322 is clear and unambiguous. It declares that the surface locator shall have the exclusive right of possession and enjoyment not only of his discovery vein but also of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of his surface boundaries extended vertically downward. The ownership thus conferred is wholly unqualified, except by the section itself in expressly limiting him to only so much of the vein on its strike as is within his parallel end lines. This absolute grant is even enlarged by giving the locator *all* of such veins (within his end lines projected,) though on their dip they may pass outside of perpendicular planes through his side lines. The statute is silent as to the *direction* of the veins mentioned. The grant is just as full and just as complete where the veins on their strike intersect or cross the discovery vein, as where they are parallel to it. The only requirement is that the top or apex of the vein, whether it extend longitudinally or transversely to the location, shall be within the surface boundaries. Moreover, the absolute character of the grant in this respect is recognized in those provisions of the law and rulings of the land office, which deal with the obtaining of government title through patents. Applications to purchase and receivers receipts both contain almost the identical language of the statute; while the patent itself declares a grant in fee simple in the same unequivocal terms.

In Del Monte M. & M. Co., vs. Last Chance M. & M. Co., 171 U. S. 55, Mr. Justice Brewer says:

> "We find from Section 2322 that he (the locator) is entitled to 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. *He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines.* Not only is he entitled to all veins, whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course outside the vertical side lines."

Iron Silver M. Co. vs. Elgin M. Co., 118 U. S., 196.

King vs. Amy, etc., Co., 152 U. S., 222.

It is not contended, we believe, by any court or tribunal that the unequivocal grant above described is in any way qualified or limited, except it be possibly by said Section 2336. The following language in Section 2336 gives all the trouble:

> "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection."

This language was by the former Colorado rule, construed to refer to the crossing of veins *on their strike*; and the declaration that the prior location shall be entitled to the ore at the space of intersection, was held equivalent to a declaration that the junior location shall have all the ore in the cross vein, except the small quantity at the point of insection *of the two veins*.

In Branagan vs. Dulany, *supra*, the Supreme Court of Colorado, said:

> "The two sections quoted, appear to have been carelessly dratted, for they are certainly to some extent in conflict with each other. * * It is possible that it was not intended by the framers of this section (2322) to include cross lodes in the grant of the prior location. But if such was the intention, we see no way out of the dilemma, except by the application of the abritrary rule of construction suggested by the court in the case of Hall vs. Equator, etc., *supra*. That is, between conflicting statutes, the latest enacted will prevail, and between conflicting sections of the same statute, the latest in order of arrangement will control."

Thus was nullified an important part of the grant made by section 2322.

SECOND. INTERPRETATIONS THAT HARMONIZE THESE SECTIONS.

Three different interpretations of section 2336 have been suggested, either of which harmonizes it with section 2322, leaving the latter intact, viz:—

(1) That the first two clauses refer to the crossing of veins *both on their strike and dip;* the last clause, to the union of veins on the dip; and that in so far as they deal with intersection on the *strike*, they refer to lodes located *prior to the act of 1872*, where the lode discovered was located without surface ground, and the locator preserved his right thereto, as against a subsequent overlapping claim.

(2) That this section, throughout, deals exclusively with veins crossing or uniting *on their dip*. Under this view the section may be treated as dealing with locations made both before and after May 10, 1872.

(3) That the first two clauses deal primarily with *locations*. That is, the word "intersection" there used has reference to the locations, not to the veins. That it should be treated as if it read, "Where two or more veins intersect or cross each other, the prior locator shall take all ore within the space of *intersection of the locations* to which the crossing veins belong."

We will consider these views in the foregoing order:

(a) *The Ante-1872 Construction.*

Section 2322 deals, not only with locations made after 1872, when the act was adopted, but also with locations made prior to that time. The section starts out with the expression, "The locators of all mining locations *heretofore made* or which shall hereafter be made;" and throughout the act care is taken to protect prior locations made under local laws and miners rules and regulations. But, prior to the adoption of this act, in some localities, these laws, rules and regulations dealt solely with the vein. The miner located the vein alone. He did not obtain any particular portion of the surface. And his location of the vein he discovered gave him *no right to any other vein whatever*. Thus under Section 2322 certain conflicts of interest might arise, between senior and junior locations, viz:

Veins located at different times might intersect on their strike, and they might intersect on their dip. As to those veins located prior to 1872, where the vein discovered was the only thing taken, difficulty might arise over a crossing upon the strike, by the vein of a subsequently located overlapping claim.

On the other hand, as to veins located after 1872, as well as those located prior to that year, difficulty might arise from the crossing of veins on their dip. A third difficulty or conflict that might arise under Section 2322 is that of the union,

instead of the crossing, of veins located at different times.

To meet these very probable conflicts of interest, and do away with trouble arising therefrom, Section 2336 was wisely inserted into the law. Properly considered, it provides, 1st, that where veins located prior to 1872, in those districts, where the vein alone was taken, intersected on their strike, or where such a vein was intersected by the vein of an overlapping claim located after that date, the senior locator would take the ore at the point of intersection; the junior locator, of course, retaining the ore in his vein up to the point of intersection on either side, and also having a right of way through the space of intersection for convenience in working. 2d. Locations made under the act of 1872, as well as locations made prior to that date, where the veins intersected on their dip, the senior locator would take the ore at the space of intersection; the junior taking the ore in his vein throughout its entire depth, except at the space of intersection, and having the same right of way through this space. 3d. Where veins located either under the act of 1872 or prior thereto *united*, the older location to have the ore below the point of union.

The foregoing construction harmonizes the two sections, and it has been adopted by able courts.

"It must be remembered that the Re-

vised Statutes were not intended to impair the rights of quartz miners in cases where the locations were made before May 10, 1872, Rev. Sts., Sec. 2344. * * And in other localities there were what is known as lode locations; that is, where the lode alone was located without any surface ground. Now then, the provisions of Section 2336, can readily be construed as intending to protect the rights of such old ledge locations. But, in the second place, there are two kinds of intersections of quartz ledges. They sometimes intersect, and sometimes unite in their horizontal extension, or, as the miners call it, their 'strike.' But they may also intersect or unite on their dip; that is, they may intersect laterally in their downward course. And to such an intersection the provision of Section 2336 can be readily applied, in perfect consistency with the provisions of Section 2322."

Wilhelm vs. Silvester, 101 Cal., 358; 35 Pac., 997.

"In two instances contemplated by the statute (Sec. 2322) he (the miner) may pursue a lode beyond the limits of his claim, or the ground within the boundaries of his claim may be invaded by an adjacent proprietor. First, when the lode, having its apex within the boundaries of his claim, shall dip beyond them (but even in that event he is limited by the planes passing through the end lines of his claim); and second, when a locator shall have located a lode prior to the 10th day of May, 1872, under the mining laws then in force, and shall, as against a subsequent and over-

lapping claim, have saved his right to his lode in the manner prescribed in the act of 1872. In the latter case, the prior locator may follow his lode, upon its strike or dip, into other ground than his own. It will immediately suggest itself to a legislator that, where a miner may follow a lode outside of his boundaries, he might encounter adverse rights in an adjoining claim. His lode might intersect a lode of an adjoining claim, or it might unite with it. With this in mind, Congress enacted section 2336, whereby provision is made for the determination of what would otherwise be conflicting claims. It provides that at the space of the intersection of such lodes the oldest locator shall have the ore, and that the junior locator shall have a right of way through that space, to pursue and work his lode; that if there be a union of the two lodes, the senior locator shall take the ore at the space of intersection or union, and all of the lodes below the point of union. These two sections, so construed, completely define and make easy of ascertainment the rights of the miner."

Watervale vs. Leach, (Ariz.) 33 Pac., 418.

The two cases last above mentioned are very thoroughly and carefully considered. They were written long subsequent to the adoption of the former Colorado rule. Neither court knew at the time the opinions were framed of the view entertained by the other; yet, by processes of reasoning strikingly similar, they arrive at precisely the same conclusion. Moreover, both of them carefully review and discuss the Colorado rule and the

cases adopting it. In Watervale vs. Leach, after such careful examination and analysis of the Colorado cases, this rule is referred to in the following language:

> "The construction urged by appellees and supported by the Equator and subsequent Colorado decisions, violates the language of the statute, injects into it things not there, results in conflict in the statute among its parts, and makes infinitely more complex the old system of lode claims."

In Wilhelm vs. Silvester the same discussion is concluded with the following language:

> "The construction contended for by appellants would leave the rights of prior locators in the greatest confusion, their property interests in their claims would be indefinite, and the result would be wrongs, litigation and perhaps personal conflicts."

And the court adds:

> "But to give Section 2322 its clear and undoubted meaning is to correctly fix the rights of prior locators as we think Congress intended them to be fixed."

Mr. Lindley, in his able work on Mines and Mining, at Section 560, reviews this entire subject thoroughly, including the former Colorado rule and cases, as well as the cases above mentioned and other authorities. He shows, by a section of an official map of Cripple Creek, much more

clearly and forcibly than any language could possibly show, the absurdity, conflict, confusion and disaster to which the Colorado rule unavoidably led. And he closes his discussion with the following:

> "We are convinced that we are justified in adopting the rule as expounded by the courts of Arizona and California in preference to Hall vs. Equator, Branagan vs. Dulany, and the other Colorado cases; not because more courts have decided one way than another, but for the reason that we believe that the logic and reasoning of the former cases are in line with the rules of construction applied by the supreme court of the United States to the act of 1872 in other instances, and that the tendency of modern decisions is to recognize the controlling force of surface boundaries. Ever since the decision of the Flagstaff case, the supreme court of the United States has pursued the central idea of referring all rights in lode claims accruing under the act of 1872 to apex and exterior surface lines. We are impressed with the belief that there is no middle ground between the Colorado and Arizona-California doctrines. We therefore conclude that a subsequent locator has no right to invade the territory covered by a senior valid subsisting location, or to penetrate within vertical bounding planes drawn through its surface boundaries, except for the single purpose specified in the mining laws, and that is, in the lawful pursuit of a vein on its downword course, the apex of which is properly embraced within the junior location."

We call the court's attention, in passing, to the fact that Chief Justice Beatty, in a concurring opinion in Wilhelm vs. Silvester, *supra*, points out an additional possible conflict or difficulty that might arise under Section 2323, in the intersection of veins. He says:

> "This being so and the law allowing the locator to follow his vein on its dip outside of his side lines projecting downward vertically and within the vertical lines of an adjoining or neighboring claim, it may easily happen that the parts of two intersecting veins included within entirely distinct surface locations will intersect on their dip, either outside of *both* claims or within one or the other, according to the angle of the dip and the relation of the surface claims where the point of the apex or croppings of the veins intersect."

He then proceeds by illustration to show that it is possible for such veins, viz., those having their tops or apexes within different surface locations to intersect *on their strike* at a point outside of either of such locations, yet where they still belong to the surface locators, and says:

> "If made still further west, the line of intersection of the portions of the respective veins covered by the two locations will be wholly outside the surface lines of either location and still another case for the application of Section 2336 will arise."

And he concludes as follows:

> "Here, then, are two cases for the ap-

plication of Section 2336 without bringing it in conflict with Section 2322; and the mere possibility that such cases might sometimes arise under distinct locations, each entitled to all the rights conferred by the plain terms of Section 2322, was a sufficient reason for incorporating into the law the provisions of Section 2336."

(*b*) *The Union on the Dip Construction.*

We next consider the view that confines section 2336 to a crossing or union of veins on their dip.

By section 2322, as we have seen, the grant of the territory and of all veins apexing within the surface boundaries of locations made under the act, and perpendicular planes passed through such boundaries to the centre of the earth, is absolute, with a single exception, to wit: *Every such location is subject to invasion by the locator of a vein apexing outside, following such vein on its dip into the territory below the surface.*

There was no necessity for legislation concerning veins on their strike. It was impossible for trouble to arise from the intersection or union of veins in this way; because under the grant in Section 2322, the owner of one vein can not follow that vein on its strike, either at or below the surface into the territory covered by another valid mining location; and this is true whether such other mining location be the junior or senior one.

But, obviously, the exception from the grant

in Section 2322 above mentioned, would give rise to two questions, viz.: 1st, where the outside vein on its dip intersects and crosses a vein apexing within the location invaded; and 2d, where such ouside vein intersects an inside vein and, instead of crossing, *unites* with it. In the first case, who shall own the ore at the point of intersection of the two veins; and in the second case, who shall own the ore at and below the point of union? These questions may be very important, because veins are sometimes wide and the ore at the space of intersection alone may be worth a large sum.

To meet these difficulties Section 2336 was enacted; it was intended solely to answer these questions and prevent controversies that would otherwise necessarily flow therefrom; and it says that in both instances, the prior location shall take the ore.

Nowhere does the section use the word "strke," nowhere does it expressly mention either the crossing or union of veins *on their strike*. True, it does not expressly speak of the *crossing* or union of veins *on their "dip."* But it is dealing with a condition *created by the act itself*, viz., that part of Section 2322 which expressly allows the locator to follow his vein *on its dip* beyond his side lines—the provision under which he acquires his *extra-lateral rights*; it is to meet and do away with trouble naturally arising from this extra-lateral rights provision.

Section 2322 does not contemplate any difficulty arising from the crossing or union of *veins on their strike*. If such a thing as a cross or intersecting location were thought of, Section 2322 undoubtedly contemplated that the right to a vein on its strike shall always end at the point—the surface boundary where it enters a prior location; such has been the universal construction, barring, of course, the implication by the former rule in Colorado.

Section 2336 should be construed as a whole. The punctuation is a little unfortunate; but the use of the co-ordinate conjunction "and" at the beginning of the last clause establishes a close connection between it and the two preceding clauses.

The language of the section is peculiarly appropriate and applicable to the intersection or union of veins on their dip. Veins *do intersect* and they *do cross*, and they *do unite* on their dip. And it was necessary, as well as appropriate, that the ownership of ore at the space of intersection, and after union, should be determined by the law; it was also necessary that a right of way through the space of intersection be given to the owner of the junior vein; without this he would lose his vein beyond the point of intersection, and the clear intent of Section 2322 in confirming extra-lateral rights would be partially defeated; because he can not go upon the surface of the prior location and sink for or work his vein; the last clause of Section 2322 expressly forbids any such invasion of the surface.

Again, that the crossing and union of veins on their dip was alone contemplated, finds strong corroboration in the last clause of the section: "And where two or more veins unite, the oldest or prior location shall take the vein *below* the point of union, *including all the space of intersection.*" Here we have the same mode of expression as that employed in the first part of the section. The language is not "where two or more veins unite *on their dip;*" but "where two or more veins unite;" this might under proper circumstances mean a union either on the *strike* or on the *dip.* But, fortunately, here we have a key to the real intent, in the word "below."

It is clear that the section only deals with the *union* of veins on their dip. If the *union* of veins on their strike had been intended, Congress would have said who should own the ore *beyond* the point of union. Yet, if it was intended to have the section deal with veins on their *strike* at all, why should this limitation exist? *Why would Congress take pains to say who should own the comparatively small quantity of ore at the space of intersection when the veins cross, and yet omit to provide for the ownership in case of union?* The ownership *beyond* the *point* of union would always be more important and valuable than the ownership at the space of intersection. If the first clause of the section deals with veins on their strike, it is most astonishing that no provision is made for ownership when they *unite* on the strike; on the other hand, if the last

clause of the section is the only portion that refers to veins on their dip, it is very singular that no provision is made for the contingency of their *crossing* on the dip—that no right of way is given the junior locator, through the space of intersection.

Construing the two sections together, as we must, it seems clear that Section 2336 was intended to cover simply the crossing and union of veins on their dip. This view makes it harmonize with Section 2322, and requires no strained or unnatural inference or deduction. It recognizes a wise provision by Congress for difficulties that will necessarily arise; and does not put that body in the attitude of fighting windmills, by guarding against dangers that are already amply provided for.

(*c*) *Intersection of Locations, Construction.*

We now pass to the interpretation that the word "intersection" in Section 2336 refers to intersection of *locations* and not of veins.

In Pardee vs. Murray, 4 Mont., 279, the court incidentally employs the following language:

> "If a vein with a prior location crosses another such vein, it would not disturb the possession of the subsequent location except as to the extent of the crossed vein, and would entitle the prior location to the ore and mineral contained in the space of intersection. If, with a subsequent location, the locator would be entitled only to a right of way to the extent of his cross

vein for the purpose of working his mine and no other right."

The language of the court is a little ambiguous; but considering the fact that this language was employed with reference to Section 2336, and considering the other facts in the case, the view expressed is obviously in conflict with the former Colorado rule. It sufficiently appears that the Montana court adopted the view that the word "intersection" employed in Section 2336, refers to the intersection of locations where such locations were made under the act of 1872, and not to the intersection of veins. This construction is adopted by Mr. Morrison, in his work on Mining Rights. He says:

> "It seems to the author from the above reasoning that a cross lode takes no estate in the claim it crosses and has no right as against the crossed claim, except the mere right to drift through, leaving all ore as the property of the crossed claim."

Mor. Min. Rights, 9th Ed., p. 116.

A similar view seems to be entertained by Barringer and Adams. They say:

> "Cross lodes are, of course, those which intersect on the strike. The question naturally arises as to the definition of the phrase 'space of intersection.' The question of priority of title can arise only where two locations cross. The senior locator has already, by Rev. St., 2322, been given title to all veins, lodes and ledges, the tops or apexes of which lie inside of his surface

lines. It would follow that to preserve his rights the space of intersection given him by Rev. St., 2336, must be the intersection of the cross lode with his *claim*, that is, that part of the cross lode included within his side lines."

B. & A. on Mines and Mining, p. 472-473.

(*d*) *Conclusion of cross lode discussion.*

Thus we find that at least three different views of Section 2336 are advanced, that do away with all semblance of a conflict between it and Section 2322. The third of these views is perhaps the most difficult to maintain. We confess to a strong preference in favor of the second; it rests upon a simple and natural analysis of the statutes involved; it requires no strained or unnatural construction. But each of these views is supported by much plausibility and reason. And we confidently assert that either one of the three is amply sufficient to forbid the recognition of a conflict and the nullifying *pro tanto* of Section 2322. There is nothing to warrant or excuse application of the artificial and arbitrary rule of a repeal by implication, formerly held in Colorado.

The decision of the Supreme Court of Colorado in the present case, (The Calhoun Gold Mining Company vs. The Ajax Gold Mining Company, 27 Colo.) (See abstract of record, page 84) does not adhere to either of these constructions alone. This court says, *inter alia*:

"Our conclusion is that the provisions of Section 2336 apply to locations made under the act of 1872, as well as before, refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause, and part of each, and in so far as Section 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of Section 2322."

Thus the learned court that rendered the judgment under consideration, adopts the first of the foregoing views in regard to Section 2336, with certain limitations upon the construction by the Supreme Courts of California and Arizona; it also adopts the third of the foregoing views without making it exclusive, as do the Supreme Court of Montana, Mr. Morrison and Barringer and Adams. That is, that the expression "space of intersection" employed in the statute refers to both the intersection of veins and the intersection of conflicting claims; according as the particular controversy involves a conflict between veins located prior

to the act of 1872, or to a conflict of locations made after the act of 1872 was adopted; in the language of the opinion the "space of intersection * * means either intersection of veins or conflicting claims, according to the facts in each particular case." This construction has some advantages over each of the first and third, just considered. It embodies the merits of both, while the reasoning and limitations avoid some of the difficulties inherent in both.

But as already suggested, and with all due deference to the learned court, we still think that the second construction hereinbefore given is the true one.

(*d*) *The Oschamp and Rico-Aspen cases.*

The assertion is sometimes thoughtlessly made that the U. S. Circuit Court of Appeals, in Oschamp vs. Crystal River M. Co., 58 Fed., 293, and in Enterprise M. Co. vs. Rico-Aspen Co., 66 Fed., 200, adopted the Colorado rule upon the subject. An examination of those opinions discloses the following facts, viz: That the question of cross lodes was not involved in either case; that it was not discussed at length by either court or counsel; that no ruling thereon was necessary to the decision; that the decision of the question would have been the purest *obitur dictum*; that the remarks of the court relied on in both cases were merely incidental and argumentative. The court

never dreamed that in either case it was committing itself to this rule. These cases constitute no precedent whatever; the court remains entirely free to deal with the subject, when properly presented, as one of first impression.

(*e*) *Land Office Decisions.*

But finally, in eagerly searching for extrinsic sanction of the former Colorado rule, counsel for appellant thinks he finds comfort in the U. S. Land Department decisions. A number of land office rulings are referred to, and counsel might, with equal consistency, have added two or three more. We will not take up the time of the court or prolong this brief by an analysis or discussion of these land office rulings. With reference to them we simply observe:

1st. That should Your Honors take the trouble to examine these rulings, you will find that they do not, in terms, refer to the Colorado cases, or anywhere affirmatively adopt the old Colorado rule; the inference indulged by counsel on the subject is mainly based upon the assumption that because in certain of these land office rulings, disconnected portions of a claim, severed by an intervening prior location, are allowed to be patented, therefore the cross lode doctrine is recognized. But a cursory consideration shows such conclusion to be a clear *non sequitor.*

2d. But secondly, land office rulings are notoriously changeable. Each succeeding administration produces a crop of changes in procedure and reversal of views previously expressed. Moreover, these rulings are never regarded by the courts as in any way binding, upon subjects like the present one that are clearly within the province of the judiciary.

Davies vs. Wiebold, 139 U. S., 507.

(*f*) *Former Colorado Rule in Conflict with Certain Federal Court Decisions.*

That rule was inconsistent with certain Federal decisions on the subject of extralateral rights. The doctrine is well established that where the apex of a vein passes in at the end line and out at the side line of a mining location, the owner of the location is the owner of such vein throughout its entire depth, between a perpendicular plane passing through the end line and a perpendicular plane parallel to the end line, intersecting the point of departure from the side line; that is to say, he is the absolute owner of the segment of the vein mentioned, including extralateral rights connected therewith. This doctrine is announced without any limitation or qualification whatever touching cross lodes. Yet such veins will often fulfill all the conditions required of a cross vein.

Speaking with reference to the decisions and doctrine above mentioned, after a careful discus-

sion of the subject, Mr. Lindley, at Section 591 of his work, says:

> "It (the doctrine) gives to the locator as much of the lode in depth as he has within his surface lines. It takes away nothing that could be lawfully appropriated by anyone else. * * It gives to the locator as much of the vein as the irregularity and imperfection of his location will permit without depriving others of any legal rights. It brings order out of chaos and certainty out of uncertainty. It does substantial justice to all concerned. * * While the rule yet awaits the authoritative sanction of the Supreme Court of the United States, when we consider the practical unanimity with which both trial and appellate courts in the mining regions have accepted it as the only proper solution of the question, we express the belief that the court of last resort will not withhold its approval."

Since the publication of Lindley's work the Supreme Court of the United States has fully affirmed the doctrine—Del Monte vs. Last Chance, *supra*.

See, also—

Last Chance vs. Tyler, 157 U. S., 683.

Tyler vs. Sweeney, 54 Fed., 284.

Last Chance vs. Tyler (re-trial), 61 Fed., 557.

Del Monte vs. N. Y., 66 Fed., 212.

Con. Wyo. Co. vs. Champion, 63 Fed., 540.

Tyler vs. Last Chance, 71 Fed., 848.

But this universally conceded proposition, to wit, that a mining patent or location confers upon the owner, ownership of all veins, whose apexes pass through, intersecting an end line and a side line, together with extralateral rights in connection therewith, is inconsistent with the theory that such a vein, when it happens to intersect and cross, as it frequently does, a lode upon which the location is made, may be covered and held by a junior location, except at the point where the two veins intersect. There would be a manifest and irreconcilable inconsistency in holding that the senior location or patentee *owns such a vein within his territory and is entitled to follow it throughout its entire depth into other ground, and at the same time holding that, nevertheless, it is subject to location as a cross lode, and may at any time be taken from him by means of a cross junior lode location.* It is impossible to reconcile the rejected Colorado rule with the language quoted in the fore part of this brief, used by Judge Brewer in Del Monte vs. Last Chance; a case where the vein considered, passed through an end and a side line.

No court in Colorado has, we believe, ever applied the Colorado doctrine of cross lodes to such a vein, where it intersected the vein of a prior location; in each of the foregoing Colorado cases, the cross-vein intersected both side lines of the senior location. But the Colorado rule is no less inconsistent with the reasoning and conclusion of the Federal Courts in cases like Last Chance vs.

Tyler, *supra*, where the right of the locator to veins crossing both side lines is clearly recognized, and for certain purposes the end lines are declared to be side lines. As strong a case as any, illustrating this last inconsistency, is Del Monte vs. Last Chance, *supra*.

(g) *Rejected Colorado Rule Conflicts with Patents.*

Before closing upon this branch of the case, we desire to call the court's attention specifically to the patents in the record. The record shows that the patents issued to defendant in error for the Apex, Monarch and Mammoth Pearl claims, include all of the Victor Consolidated alleged cross-vein, passing through these claims; that is, the patents expressly convey to defendant in error the territory including the 600 or 700 feet of the alleged cross-vein, together with "all veins, lodes or ledges" found therein, "throughout their entire depth," etc. On the other hand, the record shows that the Victor Consolidated patent simply conveys two little triangular pieces, one at each end, over one thousand feet apart, and aggregating probably not over an acre of ground. (See map in abstract.) This patent expressly excepts all that portion of the intervening territory covered by defendant in error's patents, together with all lodes, veins or ledges having their tops or apexes therein. There can be no doubt as to the identity of the exclusion so made, because the claims of defendant in error are expressly named and described.

Thus we find that the government of the United States, by its patents, has expressly conveyed to defendant in error title in fee to the included portion of the Victor Consolidated alleged cross lode; and that it has in the same solemn manner expressly excepted from and carved out of the grant to plaintiff in error such cross lode to that extent.

Now it would seem that the patents themselves ought to be decisive of this whole question; we venture to say that under any other circumstances they would be. In all the range of jurisprudence we do not believe there is another instance where the intention of the government of the United States, or of an individual in making two grants, expressed in this way, has ever been seriously questioned. The effect of the rule rejected is to qualify both of these patents; that is to say, by this rule there is arbitrarily, and without any warrant of law, as we maintain, carved out of our patents that which may be the most valuable thing covered by those patents; while on the other hand, this rule legislates, by judicial decision, back into plaintiff in errors patent a vein which the grantor (the United States) in express terms excluded therefrom.

We submit that this is a very strong consideration in the premises; and that if there were any doubt as to the proper construction of Sections 2322 and 2336, the two grants by the government

of the United States under Section 2322, would be decisive of this case.

The foregoing discussion is inadequate and does not satisfactorily, to us, present the subject. It might be considerably prolonged; but we feel confident that enough has been said to establish beyond question the error in the rejected rule.

SECOND—STARE DECISIS AND RULE OF PROPERTY.

But it is urged that this question was *stare decisis*, and that the rejected construction had become a rule of property in Colorado. As a consequence, counsel insists that the Supreme Court of Colorado ought to have adhered to the former construction, even though it was erroneous. We hardly think this court will give serious consideration to these suggestions; we will therefore not discuss them at any considerable length.

(*a*) *As to the doctrine of stare decisis*:

> "If a prior decision is clearly erroneous, whether from a mistaken application of the law or through a misapplication of the law to the facts, and especially if it is injurious or unjust in its operation and while no injurious results would be likely to flow from a reversal of it, it is not only a departure from the rule in *stare decisis*, but it is the imperative duty of the court to overrule it."
>
> Black on Interpretation of Laws, p. 403.

"Again, it (the doctrine of *stare decisis*) does not apply to a case where it can be shown that the law has been *misunderstood or misapplied*, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such case it is the duty of courts to re-examine the question."

Rumsey vs. N. Y., &c., Co., 133 N. Y., 79.
Black. 403.

"Of course, I am not saying that we must consecrate the mere blunders of of those who went before us and stumble every time we come to a place where they have stumbled. A *palpable mistake, violating justice, reason and law*, must be corrected, no matter by whom it may have been made."

McDowell vs. Oyer, 21 Pa. St., 417.

"If a precedent is to be followed because it is a precedent, even when decided against an established rule of law, there would be no possible correction of abuses, because the fact of their existence would render them above the law."

2 Bouv. Dict., 445.

Chancellor Kent, commenting on the rule of *stare decisis*, said that more than a thousand cases could be pointed out in England and America, which had been overruled, doubted or limited in their application.

1 Kents Commentaries, (12th Ed.) 543, *477.

Paul vs. Davis, 100 Ind., 426.

While by reference to Biglow's Overruled Cases, it will be seen that down to the year 1887, the number of such cases, reached upwards of 27,000.

(*b*) *Decision of highest court necessary to establish a rule of property.*

A decision, or a series of decisions, cannot be said to have become a rule of property, unless they are pronounced *by the highest judicial tribunal that can pass upon the subject*; that is to say, the construction of a state constitutional or statutory provision, relating to property, by a *nisi prius* state court, no matter how often repeated, nor how long adhered to, does not become a rule of property. Until the Supreme Court of the state has passed upon the subject, parties are not justified in assuming that the view has become a part of the established law. If this were not so, we might have as many different and conflicting rules of property as there are different *nisi prius* courts in the state.

And so it is with a federal statute, such as the one under consideration. A construction given it is not a rule of property until the highest court that can pass upon it has spoken; that is to say, *until the Supreme Court of the United States has investigated this particular subject*, and has adopted the rejected rule, this rule is not, under the authorities, to be treated as a rule of property even in Colorado. If this were

not so, we might have forty-five different rules of property deduced from the same statute, if the courts of the forty-five different states should happen to take as many different views thereof.

Whenever a person, in dealing with real estate, relies upon a particular construction of a given statute, he is chargedwith notice beforehand that this construction is subject to change or modification whenever the question reaches the highest court of the state, if it be a legislative act, or the Supreme Court of the United States, if it be an act of congress.

> "Where the decision of any tribunal is subject to appeal to a higher court, such decision is not effected by the doctrine of *stare decisis*, until passed upon by the highest tribunal of last resort.
>
> 23 A. & E. Enc., 21.

And until then, of course, it does not become a rule of property.

(*c*) *If an erroneous rule of property, thus established, works more harm than its reversal would, it will be discarded.*

But even where the highest court has announced a rule relating to property, which rule is found to be erroneous, unless more hardship and injury would result from its reversal than from its maintenance, the court will promptly recall the rule and correct the error. Speaking upon this subject Mr. Black, in his work on the Interpreta-

tion of Laws, at Section 151, says that a decision which has become a rule of property should be adhered to "unless it is seen that the erroneous rule itself works more harm than could result from its reversal."

Authorities might be multiplied indefinitely upon this proposition, but they are unnecessary.

The case at bar, we maintain, comes clearly and unquestionably within this exception. We have invited attention to the conflict and confusion resulting from the former Colorado rule, a little of which conflict and confusion is so forcibly illustrated by Mr. Lindley in the Cripple Creek sectional diagram heretofore mentioned. It is true, this rule has existed in that state for a number of years, and it is also true, as contended, that relying upon it many junior locations have been made across senior locations.

But, in the first place, these junior locators are usually entitled to but little consideration from the standpoint of justice; generally, as in the case at bar, they have taken advantage of the labor and industry and discoveries of the prior locator and are seeking to take from him the legitimate fruits of his efforts.

Again, these conflicting locations have lead and are leading to almost endless trouble; they breed a crop of cases among the most perplexing the courts are called upon to try; they unavoidably

lead to personal controversy, sometimes resulting in bloodshed; and it is safe to say that no other subject in connection with mining law is more prolific of perjury and its accompanying wrongs and injuries than this.

So that, even as to the cross-locations heretofore made, the result in the long run, will be more disastrous to the vast majority of the parties concerned, including the cross-lode locators themselves, than will be the abrogation of the rule.

But, numerous as are the locations already made, the number is insignificant when compared to those that will be hereafter made. In Colorado mining is as yet in its infancy. But a small portion of the state has been explored or developed. In all probability, within the next forty or fifty years, a score of new Cripple Creeks, Leadvilles, Central Cities, and Aspens will appear; and when we consider the disastrous results in the future to miners, to courts and to all others concerned, whether it be through the ownership of the claims or through the administration of the law, of a continuation of the rejected rule, all doubt as to the correctness, in this regard, of the decision now under consideration disappears.

When this Honorable Court decides the question, its decision will, of course, apply to and be controlling in Colorado, as well as in all other parts of the union. It will apply to all cross vein locations whether made before or after its announce-

ment. One construction of the statute involved will not be given for Colorado, and another for the other mining states. And the Supreme Court of Colorado has shown wisdom in discarding the erroneous construction first given. Every day that interpretation was allowed to stand but magnified the injurious results naturally flowing from its existence and rendered more difficult and embarassing its ultimate abrogation.

JUNIOR TUNNEL VEINS.

FIRST. A JUNIOR TUNNEL HAS NO RIGHT TO BLIND VEINS APEXING WITHIN A SENIOR LODE LOCATION.

We come now to the second question of law. This question is also purely one of statutory construction; it has never previously been decided, so far as we are aware, by any appellate court in the United States. It is, therefore, a question of first impression; and the discussion involved is wholly unembarrassed by any adverse ruling.

The court will remember that the Ithaca tunnel site of plaintiff in error was located and the Ithaca tunnel was begun *four years* subsequent to the location of plaintiff's lode claims, over *two years* after application for patents therefor, over *seven months and five months* respectively after issue of receivers' receipts, *four months* after the Apex patent itself had issued, and but *eighteen days* be-

fore the Monarch and Mammoth Pearl patent issued.

Plaintiff in error contends that notwithstanding these facts the Ithaca tunnel owner is entitled to hold all of the blind veins cut therein *within appellee's patented ground*. In other words, the contention is that no matter how many years a lode claim may have been patented, and no matter how many thousands of dollars may have been expended by the owner thereof in developing the same, any person may locate a tunnel site and take from him all veins apexing within his claim not appearing on the surface, and which at the time of the tunnel site location had not been actually *found*. If this contention be correct, I can today go to Cripple Creek, make a tunnel site location and hold every vein within the Independence or Portland or Strong properties, which does not appear on the surface and which the owners at this time have not actually found.

This proposition is so preposterous, so audacious and so repugnant to justice and fairness that its mere statement carries with it a negative answer. Only by the clearest and most satisfactory *statutory declaration* ought such a contention to be maintained. Hence it is that counsel, in order to support his position, is driven to the necessity of insisting that Section 2323 does not confer this extraordinary right. If this provision *does* sustain him he is no where sustained. It reads:

"Where a tunnel is run for the development of a vein or lode or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

In discussing the question proposed, it will not do to single out Section 2323 and limit ourselves solely to it, ignoring the rest of the act of which it forms a part. This section must be construed in connection with other general provisions of the act, especially with Section 2322, immediately preceeding; so interpreted, its meaning is plain.

Section 2322 is the key to the entire act, as to the extent of the grant of veins. Around it in this respect the remaining provisions cluster. In discussing the subject of cross lodes we have pointed out the comprehensive and sweeping character of this section.

We recall the fact that this section not only insures to the locator the discovery vein upon which

his location is based, but also all other "veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside" of his surface boundaries extended downward vertically; and that the grant of these *other veins* is just as full and complete as the grant of the discovery vein, is the universal view adopted by all the decisions, both Federal and State. Neither does the statute nor do the decisions make any distinction with reference to the point where such veins must apex; that is whether their apexes be upon the surface or whether they be 50 or 500 feet below the surface, the vein is covered provided such apex be within the surface boundary lines projected perpendicularly downward. We recall to the courts recollection the forcible language of Judge Brewer in 171 U. S., 55, referring to Section 2322:

> "He (the locator) is not limited to only those veins which extend from one end line to another or from one side line to another or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines."

It follows, therefore, that counsel's contention to the effect that a junior tunnel owner may take away from the senior lode location a portion of the veins apexing therein, *necessarily recognizes or presupposes a conflict between Section 2323 and Section 2322.* And he boldly asserts that such conflict exists. He carves out of the grant made by Section

2322 that which may ultimately prove to be by far the most valuable part thereof.

Here again he encounters the rule of construction that a repeal by implication will not be tolerated, unless no reasonable interpretation can be given which will harmonize the statutory provisions and give full effect to both; and we repeat that this rule is applied with greater emphasis in cases where, like the present, the alleged conflict is between two sections of the same legislative act. But, as we shall presently see, no repeal by implication exists.

Section 2323 shows upon its face, the intention of Congress *to apply to tunnel rights the principle of priority which pervades all of our mining laws.* If the tunnel site is located and the tunnel begun *before* the conflicting surface lode location is made, then, but not otherwise, the right to blind veins attaches.

Counsel reads the section as if stopped with the first semicolon. In reaching his conclusion he ignores and he must ignore, the clause following this semi-colon. It is needless to say that such is not the way to construe a statutory provision. In order to properly comprehend the intent of the law makers, all clauses of the section must be read together. The first clause declares that the tunnel owner shall have the right to possession of all blind veins discovered therein; and if this clause stood alone, there might be a possible chance for counsel

to claim that this section conflicts with the preceding one. But, unfortunately for his contention, and settling it adversely to him beyond a peradventure, the second clause of the section immediately following the semi-colon reads, "and locations on the line of such tunnel, of veins or lodes not appearing on the surface, made by other parties *after the commencement of the tunnel*, and while the same is being prosecuted with reasonable diligence, shall be invalid." This second clause is connected with the preceding one by the co-ordinate conjunction "and," and a comma would have been a more accurate punctuation point between; but this makes no difference. The declaration that surface locations made on the line of the tunnel *after* its commencement shall be invalid, clearly indicates the intention of Congress in the premises. If Congress had intended to have the provision apply to surface locations made *before* the tunnel was begun, no such misleading language would have been employed; in fact, the whole of this second clause would in such case be entirely superfluous. Had Congress inserted a provision declaring that this section "shall not give to the tunnel owner any right whatever to blind veins in surface locations made prior to the commencement of the tunnel," its meaning would not have been a particle clearer.

The foregoing interpretation gives full force and effect to Section 2323, and makes it entirely harmonious with Section 2322. It obviates all of

the wrong and injustice and paradoxical results flowing from counsel's position; it is perfectly reasonable and natural. When the prospector makes his conflicting surface location, he is aware of the previous tunnel location, of the commencement of the tunnel, and of the vested rights which the statute gives to the tunnel locator; hence, he takes his chance in regard to blind veins, and has no cause of complaint, if afterwards such veins are cut in the tunnel; but he is not bound to anticipate the subsequent location of a tunnel site and as to such subsequent tunnel, he takes no such hazard.

SECOND—THE CASES NOT INCONSISTENT WITH THE FOREGOING VIEW.

Enterprise M. Co. vs. Rico-Aspen M. Co., 66 Fed., 200, affirmed in 167 U. S., 108, and Ellet vs. Campbell, 18 Colo., 510, affirmed in 167 U. S., 116, have been referred to by a few journalists and lawyers, including counsel for plaintiff in error as supporting the construction here contended for. But a single observation touching these cases shows this claim to be groundless. In the Rico-Aspen case, the court says:

> "The tunnel was, however, located some *8 or 9 months before* the discovery and location of the Vestal claim."

And the opening sentence of the circuit court of appeal's opinion contains the same statement. While in Ellet-Campbell case it appears that the conflicting surface location was made more than

14 years after the location of the tunnel site and commencement of the tunnel, and more than *11 years after* the vein in controversy had been actually cut in the tunnel; in Ellet vs. Campbell, as stated in 18th Colorado, the proposition denied was that the tunnel location although perfect and kept in full force, "is of no avail to protect a prior discovery in the tunnel against a *junior surface location of the same lode.*"

These cases, therefore, could not possibly decide the question before us. They only go to the extent of recognizing ownership by the tunnel locator of blind veins, where the conflicting surface location was made eight months and fourteen years respectively, after the location of the tunnel site and commencement of the tunnel.

The only thing in either opinion that bears the slightest semblance of a justification of counsel's contention, is the declaration by this Honorable Court in the Rico-Aspen case that "veins or lodes discovered on the surface or exposed by shafts from the surface, must be "*found*" before any right to them vests."

Now, in the *first* place, it will be remembered that the Rico-Aspen case did not involve the right of a tunnel locator to veins cut in a *senior surface location.* And therefore, if the decision did covey such a condition, to that extent it would be purely *obiter dictum.* But, *secondly*, it is only by implica-

tion that this language can be made to refer to a case like the one at bar. That is to say, it is only by assuming that this Honorable Court in effect declared that when a surface lode location is made under Section 2322, the locator acquires no right to anything but the surface ground *and the lode or lodes he has actually discovered.* But the expression quoted is simply and solely used by way of illustration and argument; in emphasizing the clear proposition that a tunnel owner has a vested interest in veins cut in surface locations *made after* the tunnel is begun, which interest dates from the commencement of the tunnel, the court inadvertently made the broad statement quoted.

True it is that Section 2320 of the statute declares that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located;" but here again we must remember the rule that all germane provisions of the statute are to be construed together, and it follows that this declaration in Section 2320 is to be taken in conjunction with the declaration in Section 2322, that a locator shall not only have the vein upon which he locates, but also all other "veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside such surface boundaries extended downward vertically." So construed, the intention is clear. A valid location cannot be made until a vein of mineral is actually discovered; but when such a vein is discovered, the location made thereon, 1,500 by 300 feet, includes

all other veins apexing within such area; and the locator obtains just as complete and absolute a title to the undiscovered veins apexing within his ground as he does to his discovery vein.

The expression used, as we have observed by way of argument, that no right vests in a vein through a surface lode location until it is "found," is not strictly accurate. Rights to veins not "found" are being every day acquired through valid surface locations, and are every day recognized by the Government of the United States through solemn grants in patents coveying title in fee simple thereto.

When Lindley's work was published, the Rico-Aspen case had not been decided by this court. The learned author takes issue with the Circuit Court of Appeals, 66 Federal, contending that that decision is too broad in favor of tunnel locators. Sections 483 to 491, inclusive. In our judgment, however, Mr. Lindley's reasoning does not overcome the logic of that opinion or of the supreme court opinion after rendered, upon the points actually decided. But the difference of opinion between Lindley and the two courts in no manner affects our discussion in this case, because, as already shown, both decisions are in perfect harmony with the view that the junior tunnel takes nothing in a senior lode location.

In Stratton vs. Gold Sovereign M. & T. Mills, the facts were that a lode location was made Sept. 5, 1891, tunnel location, March 30, 1892, lode patent

issued April 13, 1895. So the tunnel was six months junior to the conflicting lode location. Application was made in the Federal Court of the District of Colorado by the lode claimant for an injunction to prevent the tunnel owner from running his tunnel into the lode claim, one of the purposes of the tunnel owner in so doing being to assert title to veins therein, crossing the line of the tunnel. Judge Hallett promptly granted the injunction, saying, *inter alia:*

> "When a location has been properly made in either class, and so long as it shall be fully maintained by use and enjoyment or by patent, the territory embraced in such location is not subject to adverse location by a claimant of the same class or *any other class.* * * Assuming the John A. Logan location to have been well made in the month of September, 1891, and maintained thereafter, the grantors of respondents could not afterward locate the same territory *by a tunnel or in any other way.*"

It seems that counsel in that case, like counsel here, argued that the Rico-Aspen case in some way affected the question. Judge Hallett disposes of this argument in the following terse and forcible manner:

> "The Rico-Aspen case reported in 167 U. S., was the subject of much comment at the bar, but it does not appear to have any bearing upon any question presented in this record."

The foregoing views and authorities effectu-

ally dispose of the tunnel theory urged by plaintiff in error: and we confidently reassert in conclusion upon this subject that a junior tunnel site location and tunnel take no vested or other interest in the blind leads apexing within a valid senior conflicting lode location.

The Supreme Court of Colorado, in the opinion now under review, after carefully and ably pointing out the difficulties and inconsistencies involved in the construction of Section 2323, now urged by plaintiff in error, and which was also insisted upon before that court, *inter alia* upon this subject, employs the following language with reference to said section:

> "It provides how inchoate rights to blind veins may be initiated; how they may become absolute; but nowhere does it in terms, either expressly or impliedly, declare that for these purposes it (the tunnel) may be projected into or across prior valid locations. To give it the interpretation that it does, is to inject a meaning of which it is not susceptible, renders it irreconcilable with the provisions of the sections preceding, and overthrows the doctrine of priority the foundation upon which mining rights rest. It does not provide that under a location for tunnel site purposes a right is granted to search for mineral in lands belonging to another, or that thereby a location for such purposes can be carved out of appropriated public domain."

Thus the Supreme Court of Colorado unan-

swerably disposes of the question immediately under consideration. And in so doing it: *first*, avoids all inconsistency between the two sections construed and harmonizes them fully throughout; and, *second*, it re-recognizes and upholds in this connection the fundamental principle of priority of location that has thus far characterized all legislation and judicial decision in relation to mining rights.

V.

TUNNEL RIGHT OF WAY.

FIRST. A JUNIOR TUNNEL HAS NO RIGHT OF WAY THROUGH A SENIOR PATENTED LODE LOCATION.

The third proposition of law submitted is whether the Ithaca tunnel, even though it possesses no interest in any veins apexing in the patented ground of defendant in error, is, nevertheless, entitled to a right of way through that ground. Both the trial court and the Supreme Court of Colorado answered this question in the negative, and we maintain that their conclusion is right. Incidentally, in his opinion the trial judge employed the following language:

> "The law of ownership of land is elementary, and is based on reasonable grounds, and applies to a grant from the government for a mineral patent as much as for an agricultural patent. It has the force of a common law grant. It is a free hold."

The State Supreme Court discussing this sub-

ject in the present case, also *inter alia*, expressed itself as follows:

> "In this respect, it (state legislation) has been clearly superseded by the Act of Congress, so that if appellant is entitled to the right (of way) claimed, it must attach by virtue of some provision of this act. * * Such rights as are conferred by a valid prior location, so long as it remains in full force and effect, are preserved from invasion, and cannot be infringed upon or impaired by subsequent locations. * * And are as fully protected under the rules of the common law as any other classes of real estate. Under the statutes the subsequent locator has no right to penetrate a senior valid and subsisting location underneath its surface boundaries extended downward vertically except for the purposes specified in the mining law. * * These exceptions do not include a right to drive a tunnel through such a location for the purposes of discovery. * * Our construction of Section 2323 is that a tunnel site can only embrace unappropriated public domain, and that under it no rights are conferred to extend the tunnel through previous valid subsisting locations."

Referring to this subject, Mr. Lindley, at Section 531 of his work, says:

> "After such (a mining lode) location has once been completed, the estate of its owner cannot be subjected to burdens except for public use; or, if sanctioned by the state constitution, for private use upon condemnation proceedings."

But it is argued that prior to the acts of Con-

gress it was the custom among miners to assume easements, including the running of tunnels through another's location. Therefore, that such custom or usage ought still to be recognized. But the fact is that the property then belonged to the government of the United States; miners exercised the license of going upon the public domain and extracting mineral therefrom; but these acts were all trespasses so far as the United States was concerned, and could at any moment have been stopped by the government as the paramount owner. So that all miners were simply trespassers upon another's property, and a custom existing under such circumstances could not he binding under the circumstances here presented.

The whole subject is now governed and regulated by the act of 1872. This act expressly authorizes a miner to initiate a title by location and provides for ripening, by patent, the rights thus acquired, into a title in fee simple. And when the miner has complied with the law by making a valid location, he has become the owner of the property and remains such owner unless it be forfeited, with all the advantages, so far as title is concerned, accruing under his patent when subsequently issued. The whole situation is thus radically changed. Mr. Lindley deals ably with the matter in Sec. 491, p. 603, of his work, as follows:

> "We are aware that it is contended that any mining proprietor has a right to tunnel underneath his neighbor, and that

this class of easements is granted by local rules and customs independent of questions of priority. Whatever may have been the rule sanctioned by local regulations during the period when all engaged in mining on the public lands were technically trespassers, since a perfected mining claim has been given the dignity of an estate of freehold no such right exists. Easements and rights of way may be acquired over the public domain, but after it passes into private ownership no such rights can be asserted, except for public purposes or for limited private uses, if provided for by the State Constitution. In such cases, unless consent is obtained, condemnation proceedings are necessary."

In Amador vs. De Witt, 73 Cal., 482, the right of way for a tunnel through another's location, even by means of condemnation proceedings, was denied.

In People *ex rel*, etc., vs. District Court, 11 Colo., 147, it was held that the right to construct a tramway over another's mining claim, for the purpose of transporting ore, could not be obtained without the owners' consent, even by condemnation proceedings.

In Stratton vs. Gold S. M. & T. Co., *supra*, the right of way for a junior tunnel was, as we have already seen, denied, and the progress of the tunnel was stopped by injunction, the court expressly declaring, in addition to the language quoted above, that "the territory covered by such location has been severed from the public domain and has become private property, which is no longer open to a new

appropriation;" the tunnel claimant there, as here, asserting a right to blind veins within the lode location.

It cannot be said that the U. S. statute of 1872 enlarges this common law principle relating to realty. Sec. 2338, U. S. Rev. Sts., does not have this effect; it says:

> "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage and other necessary means to their complete development, and those conditions shall be fully expressed in the patent."

This section permits the legislature to enact legislation with reference to easements. And we will next consider the position in this regard, assumed by counsel at pages 27 and 28 of his brief filed in this court.

(*a*) *As to Colorado statute granting a tunnel right of way.*

We first observe that said Section 2338 only authorizes local state legislation where the "rules" so adopted relate to *the working of mines.* There is here no express authority for state legislation where the easement sought is for "*the discovery of mines.*"

But counsel argues that, contemplated by said Sec. 2338, and covering this subject, is Sec. 3141, Mills Ann. Sts., of Colorado, which reads:

> "Any person or persons engaged in

> working a tunnel within the provisions of this chapter, shall be entitled to 250 feet each way from said tunnel on each lode so discovered. * * * And persons working said tunnel shall have the right of way through all lodes which may lie in its course.

He says that here is full and plenary authority for running the Ithaca tunnel through the ground of defendant in error. Let us see. All that portion of this section down to the last clause above quoted is declared to be repealed by the congressional provisions under consideration, in Ellet vs. Campbell, 18 Colo., *supra*. In the Rico-Aspen case, *supra*, Judge Brewer, with reference thereto, employs this language: "If that section has not been in terms repealed by the legislature of Colorado, it was superseded by legislation of congress as found in the revised statutes." The learned judge speaks of the *whole* section; he does not except from the repealing or superseding effect, any portion of it. But we may concede for the purposes of the argument that since Judge Brewer was discussing only the *length* of the vein taken, and since the question of a right of way for tunnels was not expressly before the court, his language is not decisive. We may also concede for the purposes of the argument that where a statute is only partially inconsistent with a subsequent provision, only so much of the statute is repealed as is thus conflicting.

The Supreme Court of Colorado, in the opin-

ion now under review, holds that as to tunnels run for the discovery of mineral, the Colorado statute "has been clearly superseded by the act of congress." Also that there is no provision in the latter act conferring such authority. As the Ithaca tunnel was run for this avowed purpose, the contention in the present case is thus effectually disposed of.

But there is another complete answer to the present contention by plaintiff in error, viz:

(*b*) *This local right of way provision referred to was undoubtedly repealed by the adoption of the State Constitution.*

When the Federal Statute, Sec. 2338, *supra*, says that a state legislature may provide rules involving easements for working mines, it does not override the State Constitution; it means that such statute a may be adopted by the legislature, provided it is not forbidden by the State Constitution.

Section 3141, Colorado statutes, above mentioned, was adopted by the territorial legislature in 1861; it was in existence prior to and at the time of the adoption of the State Constitution. The latter instrument declares, Schedule, Sec. 1, that "all laws in force at the adoption of this constitution shall *so far as not inconsistent therewith* remain of the same force," etc. So that only laws, existing prior to the adoption of the constitution, that are consistent with its provisions, remain in force. All laws inconsistent with the provisions of

the constitution were repealed. Sec. 14, Art. 2, of that instrument, reads: "That private property shall not be taken for private use, unless by consent of the owner, except for private ways of necessity, reservoirs, drains, flumes or ditches, on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes." And Sec. 15 of the same article reads: "That private property shall not be taken or damaged for public or private use without just compensation," etc; it also provides for the determination of such compensation through eminent domain statutes, prior to the taking or damaging.

No doubt can exist that a mining claim, held under a valid location or patent, is private property. Nor can any doubt exist that running a tunnel into or through such property by one not the owner, is a taking or damaging for private use, within the meaning of these constitutional provisions. It is not necessary to add that Congress has not the power to make valid a state statute that is in conflict with the State Constitution.

The Supreme Court of Colorado settled these questions in People *ex rel.* vs. District Court, *supra*. That opinion is decisive of the present discussion throughout. It holds, that a tramway for transporting ore from the owner's mine to his mill, is not a "private way of necessity;" that such a tramway is "private use;" that a statute—Sec. 2407, G. S., of Colorado, expressly giving the easement for such a tramway is in conflict with Sections 14 and

15, Art. 2, State Constitution; that the adoption of the constitution affected a repeal of the statute *pro tanto*, it having previously existed; and finally that Congress had not the power by Section 2338, *supra*, to make valid a legislative act void because inconsistent with the State Consitution. *Inter alia*, the opinion says:

> "To this extent, therefore, the statute in question (Sec. 2407, G. S.) is inconsistent with the Constitution, and must be held to have been repealed by it. Only the territorial laws in force not inconsistent with it continued as laws of the state." * *
>
> "The Constitution recognizes the right to appropriate private property for private ways of necessity, but not for the construction upon and over it of private railroads."

If a tramway for transporting ore is not a "private way of necessity," most assuredly a tunnel for the discovery of veins cannot be one; and certainly such a tunnel is not a "reservoir," a "drain," a "flume" or a "ditch." Moreover, the tunnel is as much a "private use" as is the tramway.

In People, *ex rel*, vs. District Court, the tramway owner sought to obtain his license to cross the intervening claim through condemnation proceedings instituted in due form of law. But plaintiff in error in the case at bar committed a wilful trespass; private property was here taken and damaged, not only without resort to "due processes of law," but

when *there is not and cannot constitutionally be any such due process of law.*

The case of Amandor Co. vs. Dewitt, 73 Cal., *supra*, is, if possible, even more analogous to the case under consideration, because there a tunnel, instead of a tramway, was involved. Though in that case the tunnel was for transporting ores, and not, as here, for the discovery of mines. There, also, the condemnation statute was invoked. But the right was as emphatically denied, as in People vs. District Court.

See also Lindley, Secs. 248 to 264, inclusive.

Therefore, we say that a statute authorizing tunnels to be run through private property without the owner's consent, is expressly forbidden by the state constitution of Colorado; hence, if there be no repeal of the clause relied on in said Section 3141, *supra*, by state or congressional legislation, this provision unquestionably fell with the adoption of the state constitution.

VI.

DISCOVERY OF MINERAL.

We now proceed to consider the fourth and last question propounded in this case:

Should plaintiff in error have been allowed at the trial to introduce evidence challenging the dis-

covery of mineral in two of the patented claims belonging to defendant in error prior to the location of its tunnel site?

(*a*) *This is an attempt to attack the patent.*

Your Honors will remember that the Ithaca tunnel site location was made seven months after the receiver's receipt had issued to defendant in error for the Monarch and Mammoth Pearl, both claims being covered by one patent; also that this tunnel location was made just *eighteen days* before the issue of the patent itself. The court will also bear in mind that the present suit was brought to enjoin plaintiff in error from further trespassing with its tunnel upon the ground of defendant in error, from taking out ore therein and for damages already inflicted. *It is not a suit directly attacking the patent for fraud.* Such a suit could only be instituted by permission of the Attorney General of the United States, and ought to be in the name of the United States. Hence, this offer of evidence amounts to *a collateral attack upon the patent.*

Counsel for plaintiff in error denies that there was in this offer of evidence any attempt to attack the validity of the patent. In support of this assertion he ingeniously argues that,

> "The patent relates back to the discovery of ore within the limits of the location, and if there was no discovery of ore within the limits of the claims of defendant in error

> at the time of the location of the Ithaca tunnel site, then the patent does not relate back to the time prior to the location of the tunnel."

Counsel's position seems to be that since he does not desire to overthrow the patent entirely, but simply aims to have it take effect at a date subsequent to the location of his tunnel site, he is not attacking the patent. A patent is, except when directly challenged, conclusive evidence of the performance of all acts, including the discovery of mineral prerequisite to its issuance. And any attempt to postpone the date when it would ordinarily take effect, so as to give precedence to a subsequent location, is an attack upon the patent itself. Counsel is wrong in assuming that a patent takes effect from the date of the discovery of mineral.

> "A mining patent is conclusive proof of discovery and location according to law. Such patent takes effect by relation as of the date of location."
>
> Clark M. L. Digest, Par. 263, p. 417, citing
> Last Chance vs. Tyler, 15 U. S. Appls. 456.
> N. P. R. R. vs. Cannon, 54 Fed., 259.
> See also Lindley, Sec. 783.

If there can be any criticism of the above proposition so stated by Mr. Clarke, that the patent is conclusive of the discovery of mineral at the date of location of a mining claim, there can be no

possible question but that it is absolutely conclusive of this fact *from the date of application to the land office for patent.* It might possibly be contended that the land officers do not necessarily investigate the existence of mineral at the date of the original location; but, be that as it may, they do unquestionably *find as a fact*, upon the evidence presented, that at the date of the application for patent, mineral in place had been discovered.

It follows therefore that plaintiff in error has in no event any such intervening right as would enable it to be heard, even if the patent were held only to relate back to the *date of entry*; its tunnel site location having been made, as above suggested, seven months after that date.

(*b*) *Patents to mining claims not subject to collateral attack.*

But not only is this an attempt to attack the patent; it possesses a further and fatal infirmity n being a *collateral* attack.

If the Land Department has jurisdiction, that is to say, if the land itself is subject to sale, the patent can only be attacked upon the ground of fraud, and such attack can only be made by a direct suit in equity in the name of the United States (the grantor) or under its direction. And it matters not even that the proceeding be a suit in equity, the attack is none the less collateral if it be not brought by the United States or under its direc-

tion for the *specific purpose of annulling and vacating the patent.* These principles are so well known and so fully understood by this court, that we shall not dwell upon them at any considerable length.

> "A patent to land over which the Land Department has the power of disposition, is impervious to collateral attack."
>
> U. S. vs. W. S. R. R. R., 15 C. C. A., 96.
> N. P. R. R. vs. Cannon, 54 Fed., 359-262.
> Mining Co. vs. Cambell, 135 U. S., 286.
> Smelting Co. vs. Steel, 106 U. S., 451.
> U. S. vs. White, 17 Fed., 564.
> U. S. vs. Iron Silver Co., 128 U. S., 73.
> Lee vs. Johnson, 116 U. S., 48.

And the patent itself is, in a collateral attack, conclusive evidence of the performance of all steps and compliance with all requirements preliminary to its issue, *including the discovery of mineral.*

"A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken."

Lindley, Sec. 777; citing:

> Davis vs. Wiebold, 139 U. S., 507.
> U. S. vs. Iron Silver, 128 U. S., 673.
> Kahn vs. O. Tel. Co., 2 Utah, 174.
> Poire vs. Wells, 6 Colo., 406.
> Justice M. Co. vs. Lee, 21 Colo., 260.
> Mont. Cent. R. R. vs. Migeon, 68 Fed., 811.
> Park River vs. Carroll, 66 Fed., 47, and other cases.

"In favor of the validity and integrity of such an instrument (a patent) we must presume that all antecedent steps necessary to its issue have been taken."

Mining Co. vs. Campbell, 17 Colo., 272.

Anderson, et. al., vs. Bartels, 7 Colo., 256.

Barringer and Adams, 415, *et seq.*

"A mining patent proves that the land is mineral, that the location is valid, that $500 have been expended for development, and that all things necessary were done."

Clark Min. L. Dig., p. 262; citing:

Beard vs. Federly, 3 Wall, 492.

Stark vs. Starr, 6 Wall, 482.

St. L. Smelting Co. vs. Kemp, 134 U. S., 636.

Eureka C. M. Co., vs. Richmond M. Co., 4. Saw., 302.

Clark's M. L. Dig., p. 417. and citations.

Says the Supreme Court of Colorado in the present case:

"As against a collateral attack, the action of the land department in issuing such patents conclusively settled that all steps necessary to constitute a valid location of these mining claims have been taken, which include the discovery of mineral. * * * It is contended on behalf of appellant that this principle is not applicable as between tunnel site and lode locations, because its rights were not involved in the

> patent proceedings. * * * We cannot understand how, upon any possible theory, the rule announced is not applicable as between a tunnel site location and a prior lode location upon which a patent has already issued. So long as the title to the claims of appellee was only evidenced by receiver's receipt, it was still subject to an attack in a way; but when patent finally issued upon these claims, it conclusively settled, as against the junior location of appellant's tunnel site, that all steps necessary to constitute a valid location of appellee's claims have been taken."

We have prolonged the argument upon this proposition more than was necessary. The patent of defendant in error was conclusive of the question here raised. The law does not permit its effect to be undermined and destroyed in the manner proposed.

We submit the case, firmly believing that the law is with us on all the points argued; that the judgment of the Supreme Court of Colorado is right; and that it will be promptly affirmed.

JOSEPH C. HELM,
For Defendant in Error.

ERNEST A. COLBURN AND
CHARLES H. DUDLEY,
Of Counsel.